

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSHUA A. GERSTEIN,

No. C 06-4643 MMC

Plaintiff,

**ORDER GRANTING DEFENDANT'S
THIRD RENEWED MOTION FOR
SUMMARY JUDGMENT; DENYING
PLAINTIFF'S SECOND RENEWED
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT; VACATING
HEARING**

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants

Before the Court, in the above-titled action brought under the Freedom of Information Act ("FOIA"), are defendant Department of Justice ("DOJ") Office of Professional Responsibility's ("OPR") Third Renewed Motion for Partial Summary Judgment, filed October 29, 2010, and plaintiff Joshua Gerstein's ("Gerstein") Renewed Cross-Motion for Partial Summary Judgment and Opposition, filed November 15, 2010, to which OPR has filed a reply and opposition. Having read and considered the papers filed in support of and in opposition to the respective motions, the Court VACATES the hearing scheduled for January 14, 2011 and hereby rules as follows.

BACKGROUND

The instant action arises from a FOIA request made by Gerstein, a reporter, to OPR and other government agencies, seeking documents related to "all so-called criminal referrals submitted by CIA to the [DOJ] since January 1, 2001 regarding unauthorized

disclosure of classified information to the press or public” and any subsequent investigations into those disclosures. (See Declaration of Joshua A. Gerstein, Ex. A (filed Oct. 13, 2006)).¹ After a series of motions, cross-motions, orders by this Court, and multiple productions of documents, the controversy has narrowed to OPR’s redactions of four documents, OPR 79, OPR 84-26, OPR 108, and OPR 109, pursuant to Exemptions 6 and 7(C) of FOIA, in particular, OPR’s withholding of portions of said documents providing information sufficient to identify two individuals who were the subjects of one of those investigations, and who ultimately were disciplined.²

By order filed September 17, 2010 (“Order”), the Court denied without prejudice OPR’s Motion for Partial Summary Judgment with respect to OPR’s above-referenced withholdings. (See Order at 3, 5); see also 5 U.S.C. § 552(b) (providing exemptions from FOIA disclosures).³ Specifically, the Court found OPR’s declarations filed in support of above-referenced withholdings were insufficient to “enable the Court to balance such individual’s privacy interest against the public interest” as OPR had “provide[d] no information as to what those positions entail or as to either employee’s position in the employer’s hierarchical structure.” (See Order at 4.) Additionally, the Court afforded OPR an opportunity to file a renewed motion for summary judgment, for the purpose of providing more detailed information as to the nature of the positions held by the subject employees. (See Order at 5.)

Thereafter, OPR filed the instant motion, along with a supporting declaration by

¹ The facts relevant to the parties’ motions are set forth in detail in the Court’s Order filed September 26, 2008. (See Order filed September 26, 2008 at 2-4.)

² The redacted portions are not limited to the names of the two individuals, but also include the precise place[s] of their employment, the details of the unauthorized disclosures, the publications in which the classified information appeared, the complainant’s name, and the date[s] the investigations were opened. (See Eleventh Declaration of Joshua A. Gerstein (“Gerstein Decl.”) Exs. OPR 79, OPR24-26, OPR 108, OPR 109.)

³ By the same order, the Court granted OPR’s Motion for Partial Summary Judgment with respect to OPR’s withholding of portions of the above-referenced documents pursuant to Exemption 5. (See Order at 5.)

1 Margaret S. McCarthy, Assistant Counsel with OPR, in which said declarant provides
 2 additional information. Specifically, as to the individual identified as an Assistant United
 3 States Attorney ("AUSA"), McCarthy states that an AUSA is "a line attorney" who "usually
 4 does not have supervisory authority and is not considered a high-level employee in the
 5 DOJ hierarchy," but that the subject AUSA, at the time of the OPR investigation, "was
 6 detailed to serve as the acting head of a DOJ component." (See McCarthy Decl. ¶¶ 11,
 7 12.) With respect to the other individual, the individual identified as an "FBI Assistant
 8 Director in Charge," McCarthy states such position is a "supervisory position" and that the
 9 individual in question was the "head official of an FBI component." (See id. ¶ 12.) OPR
 10 continues to withhold portions of documents OPR 79, 84-26, 108, and OPR 109 to
 11 preserve the privacy interests of the AUSA (see id. ¶ 14); the withheld portions include
 12 material that would identify the FBI official, which material OPR seeks to withhold on the
 13 ground that, "given the nature of the investigation, if the identity of the Assistant Director in
 14 Charge was made public, it would be relatively easy to identify the [AUSA] who was also a
 15 subject of OPR's investigation" (see id. ¶ 12).⁴

16 Gerstein continues to oppose the above-referenced withholdings and seeks
 17 summary judgment requiring disclosure of the redacted portions of the documents; in the
 18 alternative, Gerstein requests the Court conduct an in camera review of the unredacted
 19 versions of the documents and afford him leave to conduct discovery. (See Opp. at 8.)

20 ANALYSIS

21 As noted-above, OPR has withheld portions of the above-referenced documents
 22 pursuant to FOIA Exemption 6 and 7(C). Pursuant to Exemption 6, the government need
 23 not disclose "personnel and medical files and similar files the disclosure of which would
 24 constitute a clearly unwarranted invasion of privacy." See 5 U.S.C. § 552(b)(6). Pursuant
 25 to Exemption 7(C), the government need not disclose "records or information compiled for
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27 ⁴ The documents before the Court reveal a single investigation of the two individuals
 28 with respect to a joint act of alleged misconduct, with identical findings made as to each.
 (See Gerstein Decl., Exs. OPR 79, OPR 84-26.)

1 law enforcement purposes, but only to the extent that the production of such law
 2 enforcement records or information . . . could reasonably be expected to constitute an
 3 unwarranted invasion of personal privacy.” See 5 U.S.C. § 552(b)(7). The government
 4 bears the burden of showing the withheld information falls within the exemption it invokes.
 5 5 U.S.C. §552(a)(4)(B). “[T]o determine whether a record is properly withheld, [courts]
 6 must balance the privacy interest protected by the exemptions against the public interest in
 7 government openness that would be served by disclosure.” Lahr v. Nat’l Transp. Safety
 8 Bd., 569 F.3d 964, 973 (9th Cir. 2009). “Although both exemptions require such balancing,
 9 the analysis under the two provisions is not the same, as ‘Exemption 7(C)’s privacy
 10 language is broader than the comparable language in Exemption 6.” Id. at 974 (quoting
 11 U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756
 12 (1989)).

13 Here, the four documents under consideration were compiled in the course of an
 14 OPR investigation into the potentially illegal release of information by particular officials
 15 (see McCarthy Decl. ¶ 9; Second Declaration of Patricia Reiersen (“Reiersen Decl.”) ¶ 9),
 16 and consequently constitute records “compiled for law enforcement purposes” under
 17 Exemption 7(C), see Kimberlin v. Dep’t of Justice, 139 F.3d 944, 948-49 (9th Cir. 1998)
 18 (holding documents compiled in OPR investigation into “potentially illegal release of
 19 information by a particular, identified official” were “compiled for law enforcement
 20 purposes”). Further, because “the government claim[s] both exemptions for each disputed
 21 redaction, it need meet only the lower threshold of Exemption 7(C).” Lahr, 569 F.3d at 974.

22 A government employee enjoys a privacy interest in avoiding the “embarrassment
 23 and stigma” resulting from disclosure of disciplinary action. See Forest Serv. Emp. for
 24 Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1026 (9th Cir 2007)⁵; see also Stern v.
 25 FBI, 737 F.2d 84, 91-92 (9th Cir. 1984) (noting, a “primary purpose” of Exemption 7(C) is to

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 27 ⁵ Although Forest Service concerned a withholding under Exemption 6, rather than
 28 Exemption 7(C), “[b]ecause both exemptions require balancing public and private interests,
 cases arising under Exemption 6 also inform [the court’s] analysis” under Exemption 7(C),
Lahr, 569 F.3d at 974.

1 protect privacy of subjects of investigation; finding “strong interest” where “ultimate decision
 2 [is] not to prosecute”). On the other side of the balance, in order to advance the public’s
 3 interest, the disclosure of government employees’ identities must “shed light on an
 4 agency’s performance of its statutory duties or otherwise let citizens know what their
 5 government is up to.” See Lahr, 569 F.3d at 978; see also Stern, 737 F.2d at 92 (noting
 6 public’s interest in names of employees’ subject to discipline is “in knowing who the public
 7 servants are that were involved in the governmental wrongdoing, in order to hold the
 8 governors accountable to the governed (emphasis omitted)).

9 “[T]he level of responsibility held by a federal employee, as well as the activity for
 10 which such an employee has been censured, are appropriate considerations for
 11 determining the extent of the public’s interest in knowing the identity of the censured
 12 employee.” Stern, 737 F.2d at 92; see Forest Serv., 524 F.3d at 1026 (noting courts place
 13 “emphasis on the employee’s position in [an] employer’s hierarchical structure as lower
 14 level officials generally have a stronger interest in personal privacy than do senior officials”
 15 (internal quotation and citation omitted)); Stern, 737 F.2d at 92-94 (finding public’s interest
 16 greater where employee “found to have participated deliberately and knowingly” in
 17 wrongdoing as compared with employees “culpable only of inadvertence and negligence”).

18 Here, the AUSA enjoys a privacy interest in avoiding disclosure of his/her identity,
 19 and thus avoiding the embarrassment and stigma associated with disciplinary action. See
 20 Forest Serv., 524 F.3d at 1026. While the public has an interest in knowing the identity of
 21 such individual, and although this particular AUSA was “a line attorney acting in a
 22 supervisory position” (see McCarthy Decl. ¶ 13), an AUSA is “not considered a high-level
 23 employee in the DOJ hierarchy,” (see id. ¶ 11), and the public’s interest in learning the
 24 identity of such individual is diminished, see also Kimberlin, 139 F.3d at 948 (identifying
 25 AUSA as “staff-level government lawyer”; holding AUSA’s privacy interest in disciplinary
 26 record, even where lessened by AUSA’s public statements about such discipline,
 27 outweighed public’s interest in disclosure). Moreover, the DOJ concluded the disclosure
 28 was not intentional, and warranted only a “letter[] of caution.” (See Gerstein Decl., Exs.

1 OPR 84-26, OPR 108.)⁶

2 Given the level of the employee in question, the lack of intentional misconduct, and
3 the disclosure of non-exempt segregable portions of the documents, the Court, in
4 “[b]alancing the privacy interests at stake against the public interest involved,” Forest Serv.,
5 524 F.3d at 1028, finds OPR has made a sufficient showing under Exemption 7(C) that
6 disclosure of the identity of the AUSA “could reasonably be expected to constitute an
7 unwarranted invasion of personal privacy.” See 5 U.S.C. § 552(b)(7); Lahr, 569 F.3d at
8 978 (finding disclosure of individual employees’ names to be of “marginal additional
9 usefulness” and outweighed by employees’ privacy interests); Kimberlin, 139 F.3d at 949
10 (finding withholding disciplinary record of AUSA who released classified information proper
11 under Exemption 7(C)); Stern, 737 F.2d at 92-94 (finding withholding identities of FBI
12 agents proper under Exemption 7(C) where they “were culpable only of inadvertence and
13 negligence”; contrasting “high-level employee who was found to have participated
14 deliberately and knowingly” in wrongdoing”).

15 As noted, OPR also seeks to withhold the identity of the FBI official, on the ground
16 that a disclosure of his/her identity necessarily would disclose the identity of the AUSA.
17 Ordinarily, the public’s interest in disclosure increases with an employee’s level of
18 responsibility. See Forest Serv., 524 F.3d at 1026. Here, however, the public’s interest
19 must also be balanced against the AUSA’s privacy interest, which remains as discussed
20 above. In light of the lack of serious wrongdoing by the FBI official, the Court finds the
21 AUSA’s privacy interest continues to outweigh the public’s interest, such that disclosure of
22 the FBI official’s identity “could reasonably be expected to constitute an unwarranted
23 invasion of personal privacy” with respect to the AUSA. See 5 U.S.C. § 552(b)(7).

24 Accordingly, with respect to OPR’s withholding of portions of OPR 79, OPR 84-26,
25 OPR 108, and OPR 109 pursuant to Exemption 7(C), OPR’s motion for summary judgment

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27 ⁶ While OPR initially found the disclosure was intentional (see Gerstein Decl., Ex.
28 OPR-79 at 4), “OPR is neither the proposing or deciding entity for meting out discipline to
[DOJ] attorneys” (Reiersen Decl. ¶ 24).

1 will be granted.

2 In light of the above, the Court will deny Gerstein's cross-motion to the extent
3 Gerstein seeks an order of disclosure, and further, the Court will deny Gerstein's cross-
4 motion to the extent Gerstein requests the Court conduct an in camera review. See Lewis
5 v. IRS, 823 F.2d 375, 378 (9th Cir. 1987) (holding "district courts need not and should not
6 make in camera inspections where the government has sustained its burden of proof on the
7 claimed exemptions by public testimony or affidavits"). Lastly, the Court will deny
8 Gerstein's cross-motion to the extent it requests discovery. See Citizens Comm'n on
9 Human Rights v. FDA, 45 F.3d 1325, 1329 (9th Cir. 1995) (affirming summary judgment in
10 favor of agency where district court did not permit requested discovery; noting "[i]f the
11 affidavits contain reasonably detailed descriptions of the documents and allege facts
12 sufficient to establish an exemption, the district court need look no further").

13 **CONCLUSION**


14 For the reasons set forth above,

15 1. Defendant OPR's Third Renewed Motion for Partial Summary Judgment is
16 hereby GRANTED.

17 2. Gerstein's Renewed Cross-Motion for Partial Summary Judgment is hereby
18 DENIED.

19 **IT IS SO ORDERED.**

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21 Dated: January 11, 2010

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23 MAXINE M. CHESNEY
24 United States District Judge
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